

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CAL-AGREX, Inc., a California ) No. C-07-0964 SC  
Corporation, )  
Plaintiff, ) ORDER GRANTING  
v. ) DEFENDANT JERRY  
DEE VAN TASSELL, JERRY GOODWIN, and ) GOODWIN'S MOTION TO  
DOES 1 through 20, inclusive, ) DISMISS CLAIM TWO OF  
Defendants. ) PLAINTIFF'S SECOND  
   ) AMENDED COMPLAINT;  
   ) GRANTING GOODWIN'S  
   ) MOTION FOR JUDGMENT  
   ) ON DEE VAN TASSELL'S  
   ) CROSS-CLAIM  
   )  
   )

## **I. INTRODUCTION**

The Court previously struck two claims in Plaintiff Cal-Agrex, Inc.'s ("Plaintiff" or "Cal-Agrex") First Amended Complaint, and dismissed a third without prejudice. See Docket No. 43 ("First MTD Order"). The Court granted Cal-Agrex leave to amend its complaint. Cal-Agrex subsequently filed the Second Amended Complaint. See Docket No. 45.

21 Defendant Jerry Goodwin ("Goodwin") now moves the Court to  
22 dismiss the second claim of the Second Amended Complaint, in which  
23 Cal-Agrex alleges a fraudulent promise. See Mot. to Dismiss Claim  
24 Two of Pl.'s 2d Am. Compl. ("Motion to Dismiss"), Docket No. 46.  
25 Goodwin asserts that the claim as pled fails to meet the  
26 requirements of Federal Rules of Civil Procedure 12(b)(6) and  
27 9(b). Cal-Agrex opposed the Motion to Dismiss, and Goodwin  
28 replied. See Docket Nos. 50, 51. Having reviewed the parties'

1 submissions and considered the issue thoroughly, the Court hereby  
2 GRANTS Goodwin's Motion to Dismiss and dismisses Cal-Agrex's claim  
3 for fraudulent promise with prejudice.

4 Goodwin also moves the Court for judgment against Defendant  
5 Dee Van Tassell ("Van Tassell") on Van Tassell's cross-claim.  
6 See Docket No. 49 ("Cross-claim Motion"). The Court previously  
7 dismissed the cross-claim, but granted Van Tassell leave to amend.  
8 See Docket No. 44 ("Cross-claim Order"). Van Tassell never filed  
9 an amended cross-claim, and never opposed Goodwin's Cross-claim  
10 Motion. The Court therefore GRANTS Goodwin's Cross-claim Motion  
11 and dismisses the cross-claim with prejudice.

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13 **II. FACTUAL BACKGROUND**

14 According to the Second Amended Complaint, on December 23,  
15 2004, Cal-Agrex entered into a written agreement to purchase  
16 10,000 metric tons of non-fat dry milk powder ("NFDM") from  
17 Goodwin and Dee Van Tassell (together with Goodwin referred to as  
18 "Defendants"). See 2d Am. Compl. ¶ 8; Ex. A ("Agreement"). The  
19 Agreement required Defendants to ship the first 3,000 metric tons  
20 of NFDM in January, 2005. Id. ¶ 9. The Agreement required Cal-  
21 Agrex to wire a deposit of \$2,000,000 to the account of Van  
22 Tassell for the benefit of Van Tassell and Goodwin. Id. ¶ 10.

23 Between December 24, 2004 and January 13, 2005, Plaintiff  
24 initiated a series of wire transfers, depositing a total of  
25 \$1,000,000 in Van Tassell's account. Id. ¶ 12. Another party  
26 deposited an additional \$500,000 into Van Tassell's account,  
27 apparently for partial-performance of Cal-Agrex's obligations

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1 under the Agreement. Id. Plaintiff alleges that when it asked  
2 Defendants why it had not received a shipment of NFDM, Defendants  
3 acknowledged that they had not sent a shipment yet. Id. ¶ 13.  
4 Cal-Agrex further alleges that in a telephone conversation with  
5 Van Tassell on January 21, 2005, Van Tassell waived the remaining  
6 deposit required by the written agreement until the shipments  
7 began. Id. Goodwin allegedly confirmed this waiver of the  
8 remaining deposit requirement in a telephone call conversation  
9 with Cal-Agrex on January 31, 2005. Id.

10 Finally, Plaintiff alleges that Defendants have refused to  
11 deliver any NFDM. Id. ¶ 14.

12 Plaintiff's Second Claim alleges Defendants promised to  
13 deliver NFDM to Plaintiff and personally guaranteed the return of  
14 Plaintiff's deposited funds if they failed to deliver, but that  
15 Defendants never intended to perform such promises. See id. ¶¶  
16 22-29.

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18 **III. DISCUSSION**

19       **A. Motion To Dismiss**

20 Goodwin asserts two deficiencies in Cal-Agrex's claim for  
21 fraud: first, Goodwin argues that Cal-Agrex failed to plead a  
22 false promise; second, he argues that Cal-Agrex did not plead the  
23 factual allegations of fraud with sufficient particularity.

24           1. Rule 12(b)(6)

25 Pursuant to Federal Rule of Civil Procedure 12(b)(6), the  
26 court will grant a motion to dismiss if the plaintiff fails "to  
27 state a claim upon which relief can be granted." Fed. R. Civ. P.

1       12(b)(6). When evaluating a motion to dismiss, the court accepts  
2 the facts as stated by the nonmoving party and draws all  
3 inferences in its favor. See Everest & Jennings, Inc. v. Am.  
4 Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).  
5 Furthermore, the court must assume that all general allegations  
6 "embrace whatever specific facts might be necessary to support  
7 them." Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521  
8 (9th Cir. 1994). At the pleading stage, the plaintiff "need only  
9 show that the facts alleged, if proved, would confer standing upon  
10 him." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140  
11 (9th Cir. 2003).

12       The elements of a claim for fraud are "(1) representation;  
13 (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and  
14 (5) reliance and resulting damage (causation)." Vega v. Jones,  
15 Day, Reavis & Poque, 17 Cal. Rptr. 3d 26, 32 (Ct. App. 2004).<sup>1</sup>

16       The only significant changes Cal-Agrex made to the fraudulent  
17 promise claim in the Second Amended Complaint were to add the  
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19       <sup>1</sup>Goodwin suggests a different set of elements in a claim for  
20 false promise fraud. Compare Mot. to Dismiss at 7, citing  
21 California Civil Jury Instruction (CACI) 1902, with Vega, 17 Cal.  
22 Rptr. 2d at 32. The CACI is not binding authority. Although the  
23 instructions are intended to be an accurate statement of the law,  
24 they do not absolve the courts of their responsibility for  
25 interpreting California law. See Cal. Rules of Court, Rule  
2.1050(a), (b). Other courts addressing claims for false promise  
fraud, including those cited by Goodwin and those cited in the  
notes to CACI 1902, have used the elements recited here. See,  
e.g., Molko v. Holy Spirit Ass'n, 46 Cal. 3d 1092, 1108 (1988),  
superseded on unrelated grounds, Aguilar v. Atl. Richfield Co., 25  
Cal. 4th 826, 853 n.19 (2001); Lazar v. Super. Ct., 12 Cal. 4th  
631, 638 (1996); Engalla v. Permanente Med. Group, 15 Cal. 4th 951,  
974 (1997); Conrad v. Bank of Am., 45 Cal. App. 4th 133, 156 (Ct.  
App. 1996); Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 93 (Ct.  
App. 2001).

1 details of phone calls between Cal-Agrex and Defendants on January  
2 21 and January 31, 2005. Goodwin contends that by adding these  
3 dates, Cal-Agrex undermined its fraud claim. Essentially, Goodwin  
4 argues that Cal-Agrex has pled a Catch 22: absent the alleged  
5 modification of the contract, Cal-Agrex never fulfilled its  
6 contractual obligation of a \$2,000,000 deposit, so Defendants had  
7 no obligation to deliver NFDM, and Cal-Agrex has alleged no basis  
8 for concluding that their promise was false. Alternatively, if  
9 the contract was modified as alleged, the modifications took place  
10 on January 21 and January 31, 2005, weeks after Cal-Agrex  
11 transferred a portion of the deposit to Van Tassell, so Cal-Agrex  
12 did not do anything in reliance on the modified promise.

13 Cal-Agrex claims that the Court's First MTD Order forecloses  
14 consideration of this issue. The Court disagrees. The Second  
15 Amended Complaint is a new pleading, and Goodwin is entitled to  
16 challenge it. Cal-Agrex relies on the following portion of the  
17 First MTD Order:

18 Goodwin asserts that because Cal-Agrex did not  
19 deliver the originally agreed-upon deposit of  
\$2,000,000, he has not broken a promise,  
intentionally or otherwise. . . . This  
20 argument has no merit. Cal-Agrex alleges that  
it performed its contractual obligations in  
21 full, as the contract was purportedly modified  
to reduce the amount of the deposit. None of  
22 the factual allegations necessary for Cal-  
Agrex's claim depends on its performance. If,  
23 as Cal-Agrex alleges, Defendants did not  
intend to deliver NFDM or return any monies  
deposited at the time the parties entered into  
the Agreement, Defendants' promises to do so  
24 could have been fraudulent regardless of Cal-  
Agrex's conduct.  
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27 First MTD Order at 5-6 (emphasis added). Addressing the  
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1 heightened pleading requirements of Rule 9(b), the Court again  
2 noted the relevance of the alleged waiver:

3       The promise to deliver NFDM or return the  
4 money, however, was conditioned on Cal-Agrex  
5 depositing \$2,000,000 with Defendants. Cal-  
6 Agrex alleges that after it made a partial  
7 deposit, Defendants waived the remainder of  
8 the deposit requirement. . . . Plaintiff only  
9 says that this waiver occurred in January of  
10 2005. Plaintiff does not specify the date,  
11 which of the two Defendants communicated the  
waiver to Plaintiff, or how they communicated  
the waiver (*i.e.*, by telephone, e-mail, etc.).  
To the extent that Cal-Agrex's claim for fraud  
relies on its allegation that Defendants  
waived the deposit requirement, the  
allegations of that waiver in the First  
Amended Complaint lack the necessary  
specificity to satisfy Rule 9(b).

12 Id. at 7 (emphasis added). Cal-Agrex responded to the Court's  
13 concern by adding the dates of two telephone calls. 2d Am. Compl.  
14 ¶ 13.

15       The fraud claim survived the First MTD Order because, if all  
16 the allegations were true, it was sufficient. Now, Cal-Agrex has  
17 painted itself into a corner. There are two possible promises at  
18 issue. The first promise is the original Agreement, pursuant to  
19 which Cal-Agrex would deposit \$2,000,000 with Van Tassell, and Van  
20 Tassell and Goodwin would ship NFDM to Cal-Agrex. The second  
21 promise is the modified Agreement, pursuant to which Defendants  
22 would ship NFDM to Cal-Agrex without waiting for the full deposit.

23       The allegations in the Second Amended Complaint are  
24 insufficient to support a claim that either promise was  
25 fraudulent. With regard to the unmodified promise to deliver NFDM  
26 in exchange for \$2,000,000, Cal-Agrex fails to allege facts  
27 supporting the falsity element of the claim. Because Cal-Agrex

1 admits that it did not deposit the full \$2,000,000, there is no  
2 factual basis in the Second Amended Complaint for concluding that  
3 Defendants failed to keep their promise to deliver NFDM upon  
4 receipt of the deposit, or to return the deposit in the event of  
5 non-delivery, and therefore no basis for concluding that  
6 Defendants' promise was false. With regard to the modified  
7 promise, which requires the purported waiver, Cal-Agrex fails to  
8 plead reliance. Taking all of the allegations in the Second  
9 Amended Complaint as true, Cal-Agrex transferred the first  
10 \$1,000,000 before Defendants waived the remainder, so Cal-Agrex  
11 cannot possibly have relied on that waiver in making the deposit.  
12 Either Defendants' promise was not false, or Cal-Agrex did not  
13 rely on it. Either way, the claim fails.

14 Cal-Agrex claims that it relied on the waiver by  
15 "refrain[ing] from immediate demand for return of the deposited  
16 funds. . . ." 2d Am. Compl. at ¶ 26; Opp'n at 5-6. The Court  
17 fails to see how this constitutes reliance. "Reliance exists when  
18 the misrepresentation or nondisclosure was an immediate cause of  
19 the plaintiff's conduct which altered his or her legal relations.  
20 . . ." Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1239  
21 (1995). Cal-Agrex does not allege that it did anything which  
22 changed the legal relationship between it and Defendants after the  
23 waiver. It did not bind itself to new contractual obligations or  
24 release Goodwin or Van Tassell from existing obligations. Nor did  
25 Cal-Agrex do anything which affected its right to pursue legal  
26 action, as it appears to have brought this suit in a timely  
27 manner. Even if refraining from an immediate demand for

1 compliance did amount to reliance, Cal-Agrex did not plead any  
2 resulting harm from it in the Second Amended Complaint. In its  
3 Opposition, Cal-Agrex asserts, without support, that this "was  
4 clearly to Cal-Agrex's detriment, as those funds have never been  
5 returned." Opp'n at 7. Cal-Agrex deposited its money with Van  
6 Tassell before the waiver.<sup>2</sup> None of the facts Cal-Agrex alleges  
7 in the Second Amended Complaint suggests reliance on the waiver or  
8 additional harm resulting from that reliance. As such, the waiver  
9 cannot be the basis for Cal-Agrex's claim for fraud.

10           2. Leave to Amend

11           The Second Amended Complaint is Cal-Agrex's third  
12 unsuccessful attempt to repackage its contract claim as a false  
13 promise claim. The Court sees no benefit in further delaying this  
14 matter while Cal-Agrex attempts to plead fraud for a fourth time.  
15 No additional facts consistent with those alleged in the Second  
16 Amended Complaint could rectify the problems described above. As  
17 such, the Court dismisses the false promise claim with prejudice  
18 and without leave to amend. See Lopez v. Smith, 203 F. 3d. 1122,  
19 1127 (9th Cir. 2000).

20           3. Rule 9(b)

21           Because the Court has dismissed Cal-Agrex's false promise

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23           <sup>2</sup>Cal-Agrex also argues that "Goodwin's suggestion that Cal-  
24 Agrex is also required to allege that it relied on the waiver by  
depositing additional funds is nonsensical. . . ." Opp'n at 7.  
25 If, at the time of the waiver, Cal-Agrex thought it was being  
defrauded, it could have sought to rescind the Agreement and  
recover the deposited funds. Rather, it chose to seek damages for  
fraud, which required it to affirm the Agreement. See, e.g., City  
26 Bank of San Diego v. Ramage, 266 Cal. App. 2d 570, 586-87 (Ct. App.  
27 1968).

1 claim with prejudice, the Court need not reach the question of  
2 whether the claim as pled satisfied the heightened pleading  
3 requirements of Rule 9(b).

4           **B. Cross-claim Motion**

5           The Court granted Goodwin's prior motion to dismiss Van  
6 Tassell's cross-claim, but allowed Van Tassell leave to amend.  
7 Van Tassell has not done so. Goodwin now moves the Court to enter  
8 judgment on the cross-claim, or in the alternative, to dismiss the  
9 cross-claim with prejudice. Van Tassell did not oppose this  
10 motion. The Court is mindful of the need to allow pro se  
11 litigants some latitude. However, in filing his original Answer  
12 and Counterclaim, Van Tassell has demonstrated his ability to  
13 comply with the Court's deadlines and to follow the established  
14 procedures. Despite this, Van Tassell has forgone two  
15 opportunities to address the deficiencies in the cross-claim. The  
16 Court will not extend a third opportunity. The Court therefore  
17 grants Goodwin's motion and dismisses the cross-claim with  
18 prejudice and without leave to amend. As other claims still  
19 remain for resolution either through summary judgment or trial,  
20 the Court refrains from entering judgment at this time.

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22           **IV. CONCLUSION**

23           For the reasons set forth above, the Court GRANTS Goodwin's  
24 Motion to Dismiss and Goodwin's Cross-claim Motion and ORDERS as  
25 follows:

- 26           1. Cal-Agrex's claim for false promise is dismissed with  
27 prejudice and without leave to amend.

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**United States District Court**  
For the Northern District of California

- 1        2. Van Tassell's cross-claim against Goodwin is dismissed  
2                  with prejudice and without leave to amend.
- 3        3. The parties shall appear for a status conference on  
3                  February 22, 2008 at 10:00 a.m. in Courtroom 1.
- 4        4. No later than seven days prior to the status conference,  
5                  the parties shall submit to the Court a Joint Status  
5                  Statement.

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7                  IT IS SO ORDERED.

8                  Dated: January 22, 2008

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10                 UNITED STATES DISTRICT JUDGE

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